

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

NIPCAM CENTERS OF DELMARVA, LLC

Employer

and

Case 05-RC-093020

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 27 A/W UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL
UNION

Petitioner

REPORT ON OBJECTIONS AND
NOTICE OF HEARING

Pursuant to a Stipulated Election Agreement¹ approved on November 20, 2012, a secret-ballot election was conducted on December 7, 2012 with the following results:

Approximate number of eligible voters	36
Void ballots	0
Votes cast for Petitioner	30
Votes cast against participating labor organizations	3
Valid votes counted	33
Challenged ballots	1
Number of valid votes counted plus challenged ballots	34

On December 12, 2012, Nipcam Centers of Delmarva, LLC, the Employer, filed timely objections to conduct it alleges affected the results of the election.² (Copy attached as Exhibit A)

¹ The unit is: "All full-time and regular part-time chicken catchers, lead chicken catchers, and forklift drivers working in the Employer's chicken catching operations that serve the chicken processing plant in Hurlock, Maryland; but excluding all Crew Leaders, professional employees, office clerical employees, guards and supervisors as defined by the Act."

² The petition was filed on November 13, 2012. The undersigned will consider on its merits only that alleged interference that occurred during the critical period, which begins on and includes the date of filing of the petition and extends through the election. *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962).

THE OBJECTIONS

The Employer alleges Petitioner and the Board Agent who conducted the election engaged in the following acts of misconduct for which the election should be set aside:

Objection 1:

The vote was held from 7:00 a.m. to 12:00 p.m. at the Hampton Inn in Seaford, DE. We observed from the Applebee's parking lot across the street, where we were able to fully see the front entrance to the Hotel. We had seen Mr. Ellis Staten, Jr. several times that morning from the time he arrived around 8:30 a.m. – 12:00 p.m.. We had not seen or spoken with Mr. Nelson Hill at all that day until we went to hear the results. At 12:00 p.m. when the reading of the ballots occurred, we entered the building and took the elevator to the 2nd floor to the polling room. When we arrived, Mr. Nelson Hill was already on the premises. Because we were 100 yards away from the polling place the entire day, and did not see Mr. Nelson Hill ever enter the Hotel, we know that Mr. Nelson Hill must have been operating inside the polling location (the Hotel) the entire day. This means that he was within 100 yards of the polling place. Mr. Hill was not an observer and neither were we. Mr. Hill should not have been there. He was inside the building and most likely conversing with our employees before they cast their ballot.

The Employer contends Petitioner's agents must have arrived to the hotel earlier and been within its premises throughout the election. The Employer claims this violates rules requiring election party representatives to remain at least 100 yards away from the election site during the election, and barring conversations with voters prior to casting their ballot.

There is no rule specifically requiring election party representatives to come no closer than 100 yards of an open polling site, or barring them in absolute terms from conversing with voters. While the Board will set an election aside based on conversations with voters in the polling area or waiting in line to vote, *Milchem, Inc.*, 170 NLRB 362 (1968), it does not apply its rule to conversation with prospective voters outside a no-electioneering area. *Golden Years Rest Home*, 289 NLRB 1106 (1988); *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982). In this case, the polling area itself was a specific room on the second floor of the hotel, not the entire hotel premises. The Employer offered only conjecture that agents of the Petitioner might have conversed with voters within the hotel, and speculation that Petitioner's agents may have

been somewhere inside the hotel. The Employer having failed to put forth evidence of any conversations with voters in the polling area or waiting in line to vote, even assuming the truth of the matter asserted therein, Objection 1 does not provide grounds to set aside the election.

Accordingly, I recommend that Objection 1 be overruled in its entirety.

Objection 2

We remained off the premises for the duration of the vote time. We have proof of Mr. Ellis Staten, Jr. and Mr. Ruben Lopez on the Hampton Inn Grounds, conversing with our employees before they went in the building to place their vote. According to the agreement we signed, this is not in accordance to the rules of the vote.

In support of this objection, the Employer offers photographs taken of the parking lot in front of the Hampton Inn Seaford Hotel where the election was held.

As noted above, there is nothing in Board law or the parties' Stipulated Election Agreement that makes conversation with prospective voters outside the election area grounds for setting aside the election.

Thus, I recommend that Objection 2 be overruled in its entirety.

Objection 3

At approximately 9:30 a.m. – 10:00 a.m., Mr. Staten, Jr. and Mr. Ruben Lopez moved their vehicle to the same parking lot in which we were parked. They parked only a few spaces down from where we were parked. Mr. Lonny Arter and Ms. Kim Ward made a trip into the Applebees. Mr. Lonny Arter returned to the vehicle first and when he did, Mr. Staten, Jr. was taking a picture of him. When Mr. Arter waved at the camera, Mr. Staten, Jr. decided to exit his vehicle and approach Mr. Arter. Ms. Hastings was still in the vehicle that belonged to the NIPCAM employees and began recording the conversation between Mr. Staten, Mr. Lopez and Mr. Arter. When Mr. Staten, Jr. saw Ms. Hastings recording he offered for her to come out and hear the conversation more clearly. Mr. Staten, Jr. tried to make us feel threatened that we were not allowed to be 100 yards away. He proceeded to slander Mr. Arter by calling him a "bigot" and Mr. Lopez stated that we treat our employees "like shit". When Ms. Ward came out of Applebees, we all tried to get away from Mr. Staten, Jr. by retuning to our vehicle. Mr. Staten followed us and when we informed him he was harassing us he tried to say he was not. We have everything recorded to prove the inappropriate actions of Mr. Ellis Staten, Jr.. Mr. Staten, Jr. proceeded to call the local police when he clearly knows he was the one that caused the confrontation and approached us.

The Employer contends that conduct by Petitioner's agents away from the polling site should result in a re-run election. The Employer offers a recording of the alleged altercation. However, the Employer has not alleged, or presented evidence, that any incident took place near or in the presence of voters. The Board's inquiry in determining whether conduct affected the results of an election is the potential impact on employees. Here there was no evidence that any bargaining unit employee was present for or became aware of the incident.

I therefore recommend that Objection 3 be overruled in its entirety.

Objection 4

When the results of the vote were read, the following people were present:

From NLRB: Mr. Joe Shore

From Local 27 Union: Mr. Nelson Hill, Mr. Ellis Staten, Jr. and Mr. Ruben Lopez.

From NIPCAM Services of Delmarva: Ms. Kim Ward, Ms. Nicole Hastings, and Mr. Lonny Arter.

After the results were read, 30-3 in favor of the Union, we witnessed Mr. Joe Shore shaking hands with Mr. Ellis Staten, Jr. and Mr. Shore saying to Mr. Staten, Jr. "Congratulations, we look forward to doing more business together." It is our understanding that the NLRB is a mediator and does not choose sides. This is proof that the NLRB had already sided with the Local 27 Union.

In support of this objection, the Employer presented three handwritten statements from company officials.

Statements that come across merely as inappropriate or ill-chosen are insufficient to overturn an election. *See, e.g., Walt Sound, Inc.*, 203 NLRB 366 (1973); *Sonoma Health Care*, 342 NLRB 933 (2004). Instead, the Board's concern in looking at statements during and after an election focuses on whether the Board Agent's conduct affected the integrity of the processes or

whether it is an unacceptable breach of neutrality. *See, e.g., Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967); *Renco Electronics*, 330 NLRB 368 (1999).

Even assuming the truth of the matters asserted in Objection 4, the circumstances do not warrant overturning the results. The alleged comment is insufficient to call into question the integrity of the election. Furthermore, the alleged conduct in this case took place after the count, not in the presence of voting employees during the election, and hence could not have affected the results of the election.

I therefore recommend Objection 4 be overruled in its entirety.

Objection 5

We called Mr. Shore (NLRB) on Wednesday, December 5, 2012 asking him to answer some questions about our rights as an observer. Mr. Shore never returned our phone call. According to what we signed regarding the “Stipulated Election Agreement,” the section about the observer (#5) states “Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.” It did not state that the observer had to be someone that was on the voter eligibility list. Mr. Shore told us on December 7, th when we arrived at the polling place to be an observer, that we were not allowed to be observers. He stated that it had to be someone on the voter eligibility list. We have spoken with someone that has had a union vote in the past where both parties had an observer at the polling place that was not specifically on the voter eligibility list. We are aware that this is not legal and was in the favor of the Union so that the employer did not have an observer present.

The Board has long held that breaching an election agreement provision calling for equal number of observers is a material breach that warrants setting aside the election. *Breman Steel Co.*, 115 NLRB 247 (1956). The requirement that observers be employees of the employer is not a material breach and is, per se, not objectionable. *Kelley & Hueber*, 309 NLRB 578, 579 (1992). On the other hand and by contrast, a breach that precludes one party from having an equal number of observers is a material breach that warrants setting aside the election even without prejudice. *Browning-Ferris Industries of California*, 327 NLRB 704, (1999). In

Browning-Ferris Industries, the Board directed a specific procedure to be followed in the event a party to an election puts forth an ineligible observer:

In other words, the procedure to be followed in the event that a party proposes to use an observer who is alleged to be ineligible is not to prohibit the party from using the observer, but rather, as we have stated, to put parties on notice that the use of the ineligible observer may later result in the setting aside of the election results, and to allow the election to proceed with that understanding.

Id at 705.

As it appears that substantial and material issues have been raised which can best be resolved by record evidence, I find a hearing is warranted with respect to the issues raised in Objection 5.

SUMMARY

In summary, the undersigned recommends that Employer's Objections 1 - 4 be overruled in their entirety. The undersigned further directs that a hearing be held with respect to the issues raised by Employer's Objection 5.

NOTICE OF HEARING

IT IS HEREBY DIRECTED, pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, that a hearing be held in the Bank of America Center – Tower II, 100 South Charles Street, Suite 600, National Labor Relations Board, Baltimore, Maryland on **January 30, 2013**, beginning at 10:00 a.m. and continuing on consecutive days thereafter until completed, before a hearing officer of the National Labor Relations Board, who will take testimony for the purpose of resolving issues raised challenged ballots at which time the parties have the right to appear in person or otherwise and give testimony. The hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within 14 days from the issuance of such report,

any party may file with the Board in Washington, DC, an original and seven copies of exceptions thereto. Immediately upon filing such exceptions the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may decide the matter forthwith upon the record or make other dispositions of the case.

Dated at Baltimore, Maryland, this 14th day of January 2013.

Wayne R. Gold

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
Bank of America – Tower II
100 South Charles St., Suite 600
Baltimore, MD 21201

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **January 28, 2013** at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.³ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

³ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

